SUPREME COURT, U. S.

FILED

NOV 20 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

Petitioner,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM PEEL, JR.
RICHARD E. CARLTON
Counsel for Respondent
Ford Motor Company
48 Wall Street
New York, N.Y. 10005

RAY L. LEFLORE
SULLIVAN & CROMWELL
Of Counsel

ROBERT H. EHRENBARD
Counsel for Respondent
Chrysler Corporation
350 Park Avenue
New York, N.Y. 10022

WILLIAM A. KROHLEY
KELLEY, DRYE, WARREN,
CLARK, CARR & ELLIS
Of Counsel

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
Counsel for Respondent
General Motors Corporation
200 East Randolph Drive
Chicago, Illinois 60601

JOHN WILSON
KIRKLAND & ELLIS
Of Counsel

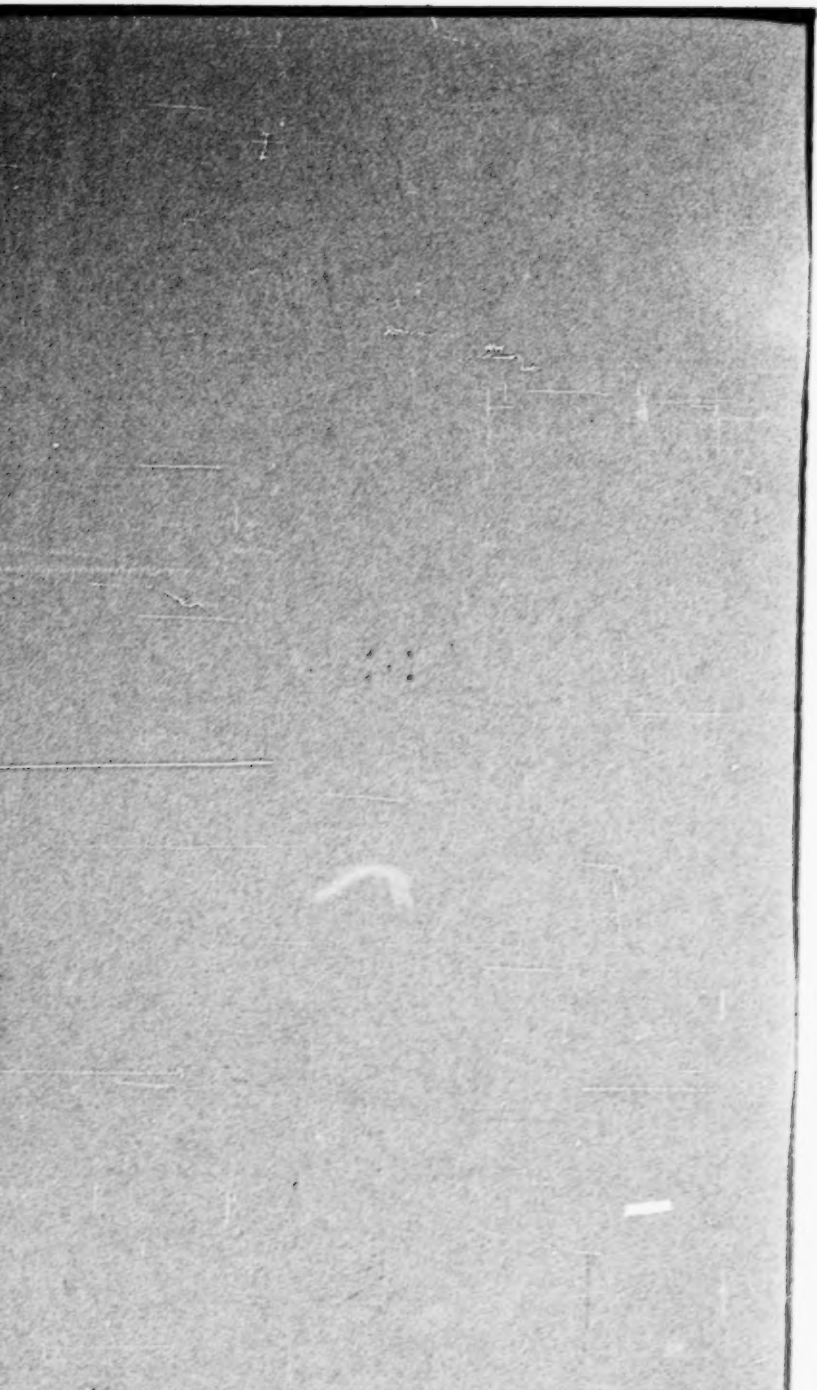

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Federal Statute Involved	3
Statement	3
Reasons for Denying the Petition	6
A. The Decision of the Court of Appeals Dismissing Petitioner's Attempt to Appeal As Of Right Was Required By Section 1291 of the Judicial Code, And Is Not In Conflict With Any Decision of This Court or Of Other Courts of Appeals	6
B. This Court Should Not Review Complicated Questions of State Law Without Benefit of Prior Consideration by the New Jersey Courts or by the Lower Federal Courts	9
CONCLUSION	11
APPENDIX A	A-1

TABLE OF AUTHORITIES

	PAGE
Azar v. *Conley*, 480 F.2d 220 (6th Cir. 1973)	7
Baxter v. *United Forest Products Co.*, 406 F.2d 1120 (8th Cir. 1969)	7
Chicago v. *Fieldcrest Dairies*, 316 U.S. 168 (1942)	10
Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949)	7
DeNubilo v. *United States*, 343 F.2d 455 (2d Cir. 1965)	7
Eisen v. *Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (May 28, 1974)	8
Hartford Fire Insurance Co. v. *Herrald*, 434 F.2d 638 (9th Cir. 1970)	7
Jumps v. *Leverone*, 150 F.2d 876 (7th Cir. 1945) ..	7
Kulesza v. *Blair*, 343 F.2d 439 (7th Cir. 1930)	7
Lehman Bros. v. *Schein*, 416 U.S. 386 (1974)	10
Louisiana P. & L. Co. v. *Thibodaux City*, 360 U.S. 25 (1958)	10
Lupia v. *Stella D'Oro Biscuit Co.*, 42 U.S.L.W. 3666 (May 31, 1974)	9
State of New Jersey v. *Emhart Corp.*, D.C. Conn., October 30, 1974, Appendix A	8

Constitutional Provisions Cited

Constitution of the State of New Jersey, Article 4, Section 7, ¶ 11	9

Statutes Cited

	PAGE
28 U.S.C.:	
§ 1254	2
§ 1291	3, 5, 6, 7
§ 1292	5
§ 1407	3
New Jersey Statutes:	
40:69-29	9
40:69A-30	9
56:9-12(b)	9, 10

Other Authorities

9 Moore's Federal Practice (2d ed. 1973), ¶ 110.08 [1] 7

IN THE

Supreme Court of the United States

October Term 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

*Petitioner**,

vs.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, and CHRYSLER CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondents, General Motors Corporation ("GM"), Ford Motor Company ("Ford") and Chrysler Corporation ("Chrysler"), in opposition to the Petition of the State of New Jersey, which seeks review of an order, filed July 22, 1974, by the United States Court of Appeals for the Seventh Circuit dismissing, for lack of jurisdiction, an appeal by petitioners from a pre-trial order of the United States District Court for the Northern District of Illinois denying petitioner leave to amend its complaint.

---

* We note that, in order to avoid confusion, the caption here stated is copied from the Petition, even though it is *not* the caption of the State of New Jersey's pending action in the District Court or the Briefs on appeal to the Court of Appeals. This caption is taken from the proposed amended complaint, which the District Court refused to allow.

Opinions Below

The decision of the Court of Appeals, dismissing petitioner's appeal for lack of jurisdiction, and of the District Court, denying petitioner's motion for leave to amend its complaint, are unreported, but are annexed to the State of New Jersey's Petition as Appendices C and B, respectively.

Jurisdiction

The jurisdiction of this Court is purportedly invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Respondents disagree with petitioner's statement of the questions presented for consideration by this Court.

In holding that it lacked jurisdiction to entertain an appeal as of right from an interlocutory pre-trial order of the District Court, which merely denied petitioner leave to file an amended complaint and did *not* affect the original complaint, the Court of Appeals declined comment on petitioner's interpretation of its state statute. The questions of what effect, if any, New Jersey's antitrust act could have upon federal procedure in a federal action, and of whether or not petitioner's state statute was intended to alter substantive rights of its political subdivisions and agencies, were not even briefed by respondents in the Court of Appeals.

Accordingly, the sole question presented for consideration by this Court, of necessity, is limited as follows:

> Whether the Court of Appeals properly held that denial of leave to amend a complaint was not a

"final decision" appealable as of right under 28 U.S.C. § 1291 where all objections to the District Court's ruling can be reviewed by a later appeal in the ordinary course and where the ruling concerns a discretionary procedural matter and does not affect any substantive right.

Federal Statute Involved

Section 1291 of the Judicial Code, 28 U.S.C. § 1291, which proscribes the jurisdiction of the Courts of Appeals with respect to appeals as of right from "final" decisions of the District Courts, is set forth in Appendix A of the State of New Jersey's Petition.

Statement

Petitioner, the State of New Jersey, is one of thirty-four states which has instituted suit on behalf of itself and its political subdivisions, charging respondents with violations of the antitrust laws in the manufacture, sale and distribution of automobiles in the "fleet market", and has had its action consolidated and transferred pursuant to 28 U.S.C. § 1407 for coordinated pre-trial proceedings in the Northern District of Illinois before the Honorable Frank J. McGarr.*

---

* The private actions pending before Judge McGarr are substantially identical to certain civil and criminal actions brought by the United States in the Eastern District of Michigan against GM and Ford. The United States' cases were fully tried and decided in favor of defendants. Judge McGarr's task of coordination in these treble damage actions, therefore, involved managing the numerous private actions assigned to him for pretrial purposes, as well as guiding their preparation in conjunction with the simultaneous progress of the United States' actions.

On January 12, 1972, long before the State of New Jersey instituted its action, Judge McGarr, determined, over the opposition of respondents, that each plaintiff-state could represent its own political subdivisions and ordered each such action to proceed as a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure. Subsequent determinations by Judge McGarr have permitted each new plaintiff-state to represent its own subdivisions.

In May, 1973—more than 14 months following Judge McGarr's class action order—the State of New Jersey instituted its action as the alleged Rule 23 representative of a class composed of all political subdivisions and public agencies within the State. After each defendant had filed its answer to the complaint, and at a time when all parties were engaged in active pre-trial discovery and preparation for a future trial, or trials, of these actions, the State of New Jersey sought leave to amend its complaint. The purpose of the proposed amendment, it stated, was to eliminate all reference to Rule 23 from the complaint, in order that it might proceed in federal court under its own procedural statute (See the State of New Jersey's Petition, p. 4). This statute, it argued, would ensure that none of its political subdivisions would opt out of the State's action (See the State of New Jersey's Petition, p. 5), regardless of whether or not each subdivision could properly allege any injury as required by Section 4 of the Clayton Act.

On March 7, 1974, after full briefing of all aspects of the questions presented, Judge McGarr entered his opinion and order denying petitioner's motion for leave to amend its complaint (Appendix B of the State of New Jersey's Petition).

On March 29, 1974, without having sought certification of the order as involving "a controlling question of law as to which there is substantial ground for difference of opinion" (28 U.S.C. § 1292(b)), petitioner filed its appeal in the Court of Appeals for the Seventh Circuit. Respondents, appellees below, moved to dismiss the appeal on the grounds that an order by a District Court denying a plaintiff leave to amend a complaint, which leaves the original complaint still standing, is not a "final" order appealable as of right under 28 U.S.C. § 1291.

The Court of Appeals, after consideration of petitioner's brief, dismissed the appeal for lack of jurisdiction, holding:

> ". . . the order denying the motion to amend the complaint in the instant case does not present a serious and unsettled question the review of which cannot await final judgment. The district court's order has not extinguished any substantive rights of New Jersey or its political subdivisions to litigate the claimed violations of the antitrust laws, subject to the due process requirements of Rule 23, Federal Rules of Civil Procedure." (Appendix C, p. 14a, of the State of New Jersey's Petition)

Petitioner now seeks review of that order of the Court of Appeals on the grounds that the Court of Appeals should have entertained its attempt to appeal as of right from Judge McGarr's pre-trial order, and asks that this Court intercede in these coordinated pre-trial proceedings in order to determine whether or not Judge McGarr abused his discretion in requiring that petitioner proceed in accordance with Rule 23.

Reasons For Denying the Petition

Petitioner has failed to state any reason to justify issuance of a writ of certiorari in this case. The decision of the Court of Appeals dismissing petitioner's appeal as required by 28 U.S.C. § 1291 is not in conflict with any decision of this Court or of other Courts of Appeals which have been presented with an interlocutory pre-trial order denying leave to amend a complaint. Because the original complaint under Rule 23 remains unaffected and because petitioner will not irretrievably lose its right to be heard after judgment, this Court, we submit, should not intercede in coordinated pre-trial proceedings merely to permit petitioner to alter its basis for representation, thereby proceeding on a different basis than the 33 other actions which still are pending in the transferee court.

In addition, and of equal importance, because petitioner's interpretation of its legislation conflicts with controlling provisions of New Jersey's own constitution, any judgment by this Court regarding the statute would be premature until New Jersey's highest court has considered these state questions of first impression, which have not even been considered by the District Court or the Court of Appeals.

A. The Decision of the Court of Appeals Dismissing Petitioner's Attempted Appeal As Of Right Was Required By Section 1291 of the Judicial Code And Is Not In Conflict With Any Decision of This Court or Of Other Courts of Appeals.

Based upon the procedural history of this action, it is clear that the order of the District Court, denying petitioner's motion for leave to amend its complaint, did not finally dispose of petitioner's case or any part thereof. In

such a situation, the Courts of Appeals have been unanimous in refusing to entertain an appeal as of right under Section 1291 of the Judicial Code, *Azar* v. *Conley*, 480 F.2d 220 (6th Cir. 1973); *Hartford Fire Insurance Co.* v. *Herrald*, 434 F.2d 638 (9th Cir. 1970); *DeNubilo* v. *United States*, 343 F.2d 455 (2nd Cir. 1965); *Kulesza* v. *Blair*, 41 F.2d 439 (7th Cir. 1930); particularly where the district court, in its discretion, attempted to reasonably limit the scope of suit, and did not impair plaintiff's substantive rights to litigate its claim. *Jumps* v. *Leverone*, 150 F.2d 876, 877 (7th Cir. 1945). See also, 9 *Moore's Federal Practice*, (2d Ed. 1973) ¶ 110.08[1], p. 115.

As interpreted by this Court in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), Section 1291 requires that an interlocutory order of a district court may not be appealed as of right unless it (a) finally adjudicates a substantive legal right; (b) is collateral to the merits; and (c) is not susceptible to meaningful review after final judgment. *Id.* 545-547.

In *Cohen*, however, this Court carefully distinguished between the "final disposition of a claimed right" in that case and the type of order from which the State here seeks to appeal. Where, as here, the order of the District Court "involved only an exercise of discretion", appeal as of right, the Court held, would not be allowed. 337 U.S. at 547. To the same effect, see *Baxter* v. *United Forest Products Co.*, 406 F.2d 1120, 1123 (8th Cir. 1969), where it was stated that the test is "whether the order involves an adjudication of an important question of law or is only an exercise of the court's discretion."

The distinction in *Cohen* between a "final disposition" and Judge McGarr's discretionary denial of leave to

amend under Rule 15(a) of the Federal Rules of Civil Procedure is essential because Judge McGarr's order is subject to reconsideration from time to time as justice may require. This fact, alone, would be sufficient under *Cohen* to distinguish this petitioner from the appellant there.* Under any other test, the numerous discretionary procedural decisions throughout every lawsuit would give rise to disruptive, and delaying, piece-meal appeals.

In *Eisen* v. *Carlisle & Jacquelin*, 42 U.S.L.W. 4804 (May 28, 1974), this Court, again, did not construe Section 1291 to permit appeals as of right from *any* order of a district court which affects the class status of a plaintiff's action. To the contrary, *Eisen*, like *Cohen*, specifically limited its application to situations where the order of a district court finally determines a collateral right which, itself, is allegedly determinative of whether a case will proceed, necessitating immediate review to prevent an irretrievable loss of the right asserted. Id. at 4808-09.

That these holdings have not opened the floodgates of appellate review to every plaintiff who attempts an appeal

---

* For example, in *State of New Jersey* v. *Emhart Corporation* (D.C. Conn., October 30, 1974), which is reproduced herein as Appendix A, the District Court rejected a similar motion by New Jersey in another federal antitrust action where the State also sought leave to amend its complaint in an effort to proceed only under its State statute. There, as here, the Court denied the State's motion for leave to withdraw its Rule 23 allegations, stating that:

> "Without becoming involved in the State of New Jersey's legal relationships to its political subdivisions and agencies at this point in this proceeding, the motion for leave to file a second amended complaint therefore shall be denied. However, the Court will grant leave to renew should the class [under Rule 23] prove incapable of certification." (Appendix A, p. A4).

as of right from a district court's class action determination, is confirmed by this Court's recent decision in *Lupia* v. *Stella D'Oro Biscuit Co.*, 42 U.S.L.W. 3666 (May 31, 1974) which, after *Eisen*, denied a petition for writ of certiorari in a case where plaintiff was denied class action status by order of the district court, sounding the "death knell" for the claims of his putative class members.

A fortiori, the petition here should also be denied since the opinion of the District Court denying petitioner leave to amend its complaint did *not* deny class action status under Rule 23, but anticipated approval of petitioner's class action as originally alleged and specifically recognized the right of New Jersey's subdivisions to be represented by the State Attorney General as *named parties* if they wished to become parties to the litigation.

B. This Court Should Not Review Complicated Questions of State Law Without Benefit of Prior Consideration by the New Jersey Courts or by the Lower Federal Courts.

The issues which the State of New Jersey asks this Court to determine *de novo* involve complicated questions of New Jersey constitutional and statutory law, affecting the relationship between the State and its municipalities and subdivisions, which have never been passed on by the New Jersey courts and were neither presented to, nor considered, by the courts below.*

* These include: (1) whether the interpretation of N.J.S.A., Section 56:9-12(b), urged by the Attorney General is correct; (2) whether the Attorney General's interpretation is consistent with N.J.S.A., Sections 40:69-29 and 40:69A-30 concerning the delegation of powers "to sue and be sued"; and (3) whether the Attorney General's interpretation of the statute, and the statute if so construed, is consistent with Article 4, § 7, ¶ 11 of the New Jersey Constitution.

In these circumstances, as this Court has previously held, it is inadvisable for a federal court to decide these issues of state law. As stated in *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25, 28 (1959), "[W]here [a state law] issue touched upon the relationship of City to State . . . [the Supreme Court has] *required* District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination", since "[t]he determination which the District Court, the Court of Appeals, or [this Court] might make could not be anything more than a forecast—a prediction as to the ultimate decision of the [state court]." *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, 172 (1942). (Emphasis added.)

In view of the strong doubt that petitioner, under its constitution and statutes, may impose the limitation upon the autonomy of its subdivisions and agencies which the Attorney General suggests were imposed by N.J.S.A. Section 56:9-12(b), this Court should await a conclusive judgment by New Jersey's highest court and should not precipitously seek to resolve questions of state law that were never considered by the courts below. *Cf. Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974).

CONCLUSION

For the reasons stated herein, the Petition of the State of New Jersey for a Writ of Certiorari to the Seventh Circuit should be denied.

Respectfully submitted,

WILLIAM PIEL, JR.
RICHARD E. CARLTON
Counsel for Respondent
Ford Motor Company
48 Wall Street
New York, N.Y. 10005

RAY L. LEFLORE
SULLIVAN & CROMWELL
Of Counsel

ROBERT H. EHRENBARD
Counsel for Respondent
Chrysler Corporation
350 Park Avenue
New York, N.Y. 10022

WILLIAM A. KROHLEY
KELLEY, DRYE, WARREN,
CLARK, CARR & ELLIS
Of Counsel

FRED H. BARTLIT, JR.
THOMAS A. GOTTSCHALK
Counsel for Respondent
General Motors Corporation
200 East Randolph Drive
Chicago, Illinois 60601

JOHN WILSON
KIRKLAND & ELLIS
Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

M.D.L. Docket No. 45

Civil Action No. 15664

STATE OF NEW JERSEY, on behalf of itself and all other public bodies in the State of New Jersey similarly situated

v.

EMHART CORPORATION, SARGENT & COMPANY, EATON CORPORATION, and ILCO CORPORATION

Ruling on Plaintiff New Jersey's Motion For Leave to File Second Amended Complaint

The State of New Jersey, by its Attorney General, originally entered this complex antitrust action as a separate party by a complaint in which it claimed to be the representative of a class consisting of political subdivisions and agencies of the State which had suffered injury by reason of the defendants' alleged illegal conduct.[1] By this motion the Attorney General seeks to rationalize his presence in this suit on different grounds, *viz.*, that he is appearing for the State, which is asserting as *its own* claim the injuries of its political subdivisions and agencies.

The Attorney General's argument is that the first amended complaint did not accurately reflect his authority

[1] Several other states are also separate parties plaintiff.

to bring suit under § 12(b) of the New Jersey Antitrust Act, N.J.S.A. § 56.9-12(b), which provides in part:

> "The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law."

Because the State does not give any subdivision or agency the power to sue except by permission of the Attorney General, the argument is that these bodies cannot be "parties" (*i.e.*, cannot themselves sue) if the State does not let them do so. Here they have not been granted permission to sue by the Attorney General, and thus the Attorney General contends:

> "The delegated authority to subdivisions and agencies to exercise the right to sue has been subordinated to the State suit and the State is suing for injuries to its parts. The State is not, as defendants assert, a 'representative' of other 'parties'. Rather the State is the one injured, and the State by the Attorney General is the party capable of bringing suit for such injury until the Attorney General decides otherwise." Memorandum in Support of Motion 11.

The defendants object that New Jersey by this motion is simply seeking the right to represent a class consisting of its agencies and subdivisions without complying with the federal rules for class actions. Fed. R. Civ. P. 23 requires, *inter alia*, that to maintain a class action it must be shown

that the parties are so numerous that joinder would be impracticable, that there are questions of fact and law common to the class, and that the named plaintiff is typical of the class. To date such showings have not been made; the class pleaded in New Jersey's first amended complaint has yet to be certified.

The legal arguments against the plaintiff's motion are ably set out in the defendants' briefs. The defendants disagree with New Jersey's interpretation of its own law, arguing that the State's political subdivisions are authorized to sue without permission from the Attorney General, and that they must be parties to the action (either joined or represented in a class action) if their claims are to be litigated. *See* Reply Memorandum in Opposition to Motion 1-6. Further, the defendants argue that state law is irrelevant to the question of when a class action is to be maintained, citing cases rejecting state attempts (authorized by state law) to appear on a *parens patriae* theory and upholding the right of a state to represent its agencies and subdivisions in a class action although not specifically authorized by state law to do so. *See* Memorandum in Opposition to Motion 3-5.

The Court finds it unnecessary at this point to try to assess the persuasiveness of these competing legal arguments. The State of New Jersey has asked the Court to allow an amended complaint to be filed, and so the determinative question is whether justice requires the Court to so exercise its discretion. *See* Fed. R. Civ. P. 15(a). Whether or not New Jersey's legal theories are correct (which would govern whether the State could initially bring suit separately by its proposed second amended complaint), it seems

clear that in the interest of "justice" it would be preferable to employ the rule 23 procedure with respect to New Jersey and its subdivisions and agencies. The class action rules provide significant protection for those who are members of the class: the action cannot be dismissed or compromised without approval of the Court and notice to members of the class. *See* Fed. R. Civ. P. 23(d)-(e). New Jersey's subdivisions and agencies would not have the same opportunity to object or have the Court speak for their interests if the State's motion to amend were to be granted.

Without becoming involved in the State of New Jersey's legal relationships to its political subdivisions and agencies at this point in this proceeding, the motion for leave to file a second amended complaint therefore shall be denied. However, the Court will grant leave to renew should the class prove incapable of certification. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 30th day of October, 1974.

M. JOSEPH BLUMENFELD
M. Joseph Blumenfeld
United States District Judge